In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 872

WILLIAM G. DEXTER and LEEVY C. MEARS, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on October 15, 1965, with an opinion reported at 351 F.2d 461. The mandate of the court of appeals issued on November 8, and was recalled and stayed on November 24, 1965. On December 14, 1965, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to January 4, 1966, without prejudice to the Court's consideration of the question whether the petition was in time. The petition is, we submit, clearly out of time under Rule 22 of the Rules of this Court since the time to file a petition for a writ of certiorari is measured from the entry of judgment, and not from the date that the mandate of the court of

appeals issues. *Boylan* v. *United States,* 257 U.S. 614; see, also, *Allegrucci* v. *United States,* 372 U.S. 954.

There is in any case no issue warranting review by this Court. Petitioners were convicted in the United States District Court for the Southern District of Florida of making sales of amphetamine tablets (benzedrine) in unlabelled bottles without prescription, in violation of 21 U.S.C. 331(k), on five different occasions in December, 1962 and January, 1963. Each was sentenced to concurrent terms of imprisonment for one year. There is no dispute that the sales were made. Petitioners' contention is that the evidence showed, as a matter of law, that they were entrapped and that the issue of entrapment was erroneously submitted to the jury for determination.

The evidence showed that a food and drug inspector, who had received complaints that drivers were handling "bennies", was informed that one "Bill" was "peddling" them (R. 67). The inspector, with the help of a truck driver, called petitioner Dexter and made an arrangement for the purchase of 1,000 "bennies" (R. 71). Both petitioners appeared at the meeting, at which the inspector purchased 1,000 pills (R. 14). At that time Dexter tried to get the agent to take a larger quantity, saying that more than 20,000 could be sold at one truck stop (R. 14). On November 1, the agent purchased an additional 4,000 tablets represented as "bennies" (R. 74). Both sets of tablets were found on analysis to be caffeine tablets, not benzedrine (R. 75). Thereafter the inspector told Dexter that a person to whom he had sold the "bennies" had found them to be nothing more than caffeine tablets and that the inspector "Almost got the hell beat out" of him (R. 79). He asked for "strong" bennies (R. 79-80). Dex-

ter said that the inspector would have to take a large steady supply or he would not handle them (R. 87-88). He said one could get into trouble with Food and Drug for handling such materials (R. 103). Thereafter, the petitioners supplied genuine (benzedrine) tablets, as charged in the indictment. On December 10, Mears said the tablets he transferred were the "real thing" and cautioned the agent not to transfer them at a truck stop itself but to meet the purchaser outside (R. 32-33). Petitioners also told the agent they had checked on him, as they had to do on everyone "to be sure." (R. 38).

The fact that petitioners tried to palm off caffeine tablets as "bennies" in their first transactions with the inspector does not show that they were entrapped into dealing in the "real thing" when they learned that their ruse had been discovered. Their statement that they would supply benzedrine only if the inspector agreed to take a steady supply, and their subsequent statement that they had checked up on the inspector, fully justified the inference that they were already in that business, but were more cautious when they felt obliged to deliver real, rather than spurious, "bennies". The issue of entrapment, which called for resolution on the basis of inferences to be drawn from the evidence, was properly submitted to the jury. *Masciale* v. *United States,* 356 U.S. 386.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1966.

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